Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1705

J. M. DUNGAN, as Trustee for ABC TOWING SERVICE OF SALINAS, INC., a bankrupt corporation,
Petitioner,

vs.

MORGAN DRIVE-AWAY, INC., NATIONAL TRAILER CONVOY, INC., and TRANSIT HOMES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioner, J. M. Dungan, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 13, 1978.

CITATION TO OPINIONS BELOW

The order of the District Court for the Northern District of California granting summary judgment

to Respondents is printed in Appendix B hereto. The opinion of the Court of Appeals which affirmed the judgment of the District Court for the Northern District of California is printed in Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on January 13, 1978. The Court of Appeals denied Petitioner's Motion for Rehearing and Motion for Rehearing En Banc on February 28, 1978.

THE QUESTION PRESENTED

1) Does the impanelling of a special criminal grand jury, by the Antitrust Division of the United States Department of Justice come within the language of § 5 of the Clayton Act pertaining to ". . . any civil or criminal proceeding instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws . . .", for the purpose of tolling the statute of limitations?

STATUTE INVOLVED

The statutory provision involved is Section 5 of the Clayton Act as amended which is set out in Appendix C.

THE FACTS OF THE CASE

ABC Towing Service of Salinas, Inc., a bankrupt corporation for which petitioner J. M. Dungan is trustee, was incorporated in August 1960. (CR 117)

In 1964, ABC had applied to the Interstate Commerce Commission (hereinafter "ICC") for a permit to haul mobile homes to eleven Western states. ABC received temporary operating authority to act as a contract carrier on interstate moves in August of 1965. (CR 117)

ABC's application for interstate authority on initial moves (moves involving new mobile homes) and secondary moves (moves involving used mobile homes) was the subject of two hearings before the ICC in San Francisco in 1965. (CR 117) At each of these hearings, attorneys representing Respondents Morgan, National and Transit vigorously opposed ABC's application for a permit on initial and secondary moves. As a result of this concerted opposition, ABC's application for interstate authority was denied. (CR 118)

The denial of ABC's applications before the ICC halted the growth which ABC had enjoyed under temporary interstate authority, and thereafter the corporation's business began a steep decline. This decline was the direct result not only of the Respondents' opposition to ABC's ICC applicaton, but also the many other illegal, predatory and monopolistic acts by the Respondents which were later uncovered in their prosecution, by the United States Department of Justice, for criminal antitrust violations. The conspiracy by the Respondents in violation of the antitrust laws fi-

nally resulted in the bankruptcy of ABC on April 23, 1969. (CR 118)

On February 7, 1972, a special criminal grand jury was impanelled by the United States Department of Justice. Shortly after the grand jury was impanelled the United States Department of Justice contacted Mr. Trentleman, the former manager of ABC, and informed him of the proceeding. Mr. Trentleman was in fact called at this time as a witness before the grand jury. On August 23, 1972, seven months after the grand jury was impanelled, a criminal indictment was returned against the Respondent corporations, and several of their managing individuals, charging violations of the antitrust laws. (CR 118)

The entire record compiled in the Government enforcement proceeding, beginning with the impanelling of the grand jury and running through the prosecution of both criminal and civil actions against the Respondents, is forceful and unequivocal evidence of the clear liability which they bear for the damages suffered by ABC Towing. Each of the Respondents entered pleas of *nolo contendere* to the crimes charged by the special grand jury and were sentenced on September 27, 1974. (CR 150-164, 165-175) In addition a civil antitrust action was brought by the United States against the Respondents, *United States v. Morgan Drive-Away, et al.*, Civil No. 74-1781.

Petitioner, anticipating the benefits which would accrue from the governmental proceedings, did not file this action until August 20, 1975. The complaint in this action alleges that ABC sustained injury as a

result of the violations by the Respondents of Sections 1 and 2 of the Sherman Act. The specific violations alleged are, in the main, identical to those alleged by the Government in its proceedings against Respondents. (CR 1-16)

ARGUMENT

Petitioner respectfully suggests the appropriateness of a writ of certiorari on the following grounds:

1. The opinion of the Court of Appeals for the Ninth Circuit in this matter insofar as it construes the mandate of *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965), relating to the construction of 15 U.S.C. § 16(i) (formerly 15 U.S.C. § 16(b)), did not consider and is inconsistent with its holding in *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977) (cert. granted on tolling issue only, Dkt. No. 77-598, 1-9-78). This issue is now before the Court and the decision reached in *Mt. Hood Stages* will affect the present case.

2. The holding that the statute of repose purpose of 15 U.S.C. § 16(i) should foreclose a private antitrust plaintiff from maintaining a suit even though the United States has impanelled a special grand jury to consider the possibility of criminal antitrust violations for which the plaintiff may have a claim is a question of exceptional importance in light of the *basic* policy objective of Congress in utilizing "private

self interest" as a means of "further effective enforcement of the antitrust laws."

In *Mt. Hood Stages, Inc. v. Greyhound Corp.*, this Court and the Court of Appeals for the Ninth Circuit considered the question of whether the filing of a petition for intervention by the United States Government in administrative proceedings before the ICC tolled the running of the statute of limitations for a private antitrust case until those proceedings were terminated and for one year thereafter as provided for by 15 U.S.C. §16(i). The Court of Appeals concluded that in order to give effect to the Congressional purpose of §16(i) and to the mandate of this Court, as expressed in *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965), "the literal wording of Section 16(i) is not controlling" and, in interpreting § 16(i), form should not control substance. 555 F.2d at 699. And, although within the context of the administrative proceedings before the ICC, a violation of the antitrust laws could not be prevented, restrained nor punished within the literal wording of the statute, the Court of Appeals concluded that the language of the statute did not and should not bar an interpretation of the statute which preserved for Mt. Hood its private cause of action.

Under the circumstances presented by this case it can be fairly said that the United States had initiated activity which falls within the class of proceedings "to prevent, restrain or punish violations of the antitrust laws" and the character of which was such that some benefits might likely be conferred upon

the private antitrust plaintiff by permitting the proceedings to run their course. ABC's manager was contacted by representatives of the Antitrust Division of the United States Department of Justice shortly after the special grand jury was impanelled in early 1972, well within the four-year period from April 23, 1969. He also appeared as a witness before the grand jury. Thus, he was put on notice of the matters being investigated and that ABC might likely derive benefits from government action directed at antitrust violations which affected its business.

It is respectfully submitted that to say a criminal proceeding had not been "instituted" by the United States and to interpret the tolling statute in such a way as to compel ABC to file its antitrust suit while the grand jury was investigating and considering the same violations of the antitrust law upon which its claims are based is, in the language of the *Mt. Hood Stages* decision, a "grudging interpretation" which collides head-on with Congress' *basic* policy objectives. See 555 F.2d at 700.

The opinion of the Court of Appeals in this action suggests that its conclusion is correct because if petitioner's interpretation of § 16(i) were given effect, it would result in uncertainties about when suspension of the running of the four-year statute commences as troublesome as the uncertainties which the 1955 Act was intended to correct. Opinion, App. A, p. viii. The 1955 Act was directed both to confusion in selecting the applicable state statute of limitation and to the potential discrimination which might result depending

on the statute selected in any given antitrust suit. Such uncertainty is clearly not the type of uncertainty which the opinion suggests would result if petitioner's position was accepted. The facts presented by this case would present the courts with a factual determination to be made in each case as to what set of circumstances constitute "the pendency" of a proceeding, but the necessity of making such a determination on a case-by-case basis certainly cannot be characterized as being akin to the problems presented by trying to utilize state statutes of limitation in connection with giving effect to national antitrust enforcement policy.

As the Court of Appeals recognized in *Mt. Hood Stages,* one of the very *basic* policy objectives of national antitrust enforcement is private self interest and the "expressed purpose of section 16(i) is to further effective enforcement of the antitrust laws by permitting private litigants to have the benefits [in this effort] that may flow from government antitrust efforts." 555 F.2d at 699. It is respectfully submitted that when the "uncertainties" allegedly created by petitioner's interpretation and construction of the statute are in fact related to furtherance of national antitrust enforcement policy and the "uncertainties" to which the statute of repose was addressed were contrary to effective national antitrust enforcement policy, they should not be equated for purposes of interpreting the statute.

The interpretation and construction of § 16(i) offered by petitioner in this matter fit as comfortably with the literal language of the section as do those

adopted in *Mt. Hood Stages* and consequently it is charged that a more liberal approach to interpreting the statute should be used in this matter.

CONCLUSION

When this Court issues its decision in *Mt. Hood Stages* it will in effect conclude the proper result in this case. Accordingly, petitioner J. M. Dungan, as trustee of ABC Towing Service of Salinas, Inc., requests this Court to grant a Writ of Certiorari to review the decisions below.

Dated, May 26, 1978.

Respectfully submitted,
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GEOFFREY P. KNUDSEN
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(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 76-2681

J. M. Dungan, as Trustee for ABC Towing Service of Salinas, Inc., a bankrupt corporation,
Plaintiff-Appellant,

vs.

Morgan Drive-Away, Inc., National Trailer Convoy, Inc., and Transit Homes, Inc.,
Defendants-Appellees.

[Filed Jan. 13, 1978]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: HUFSTEDLER, SNEED and KENNEDY,
Circuit Judges.

SNEED, Circuit Judge:

Plaintiff-appellant Dungan, as Trustee for the ABC Towing Service of Salinas, Inc., a bankrupt corporation, instituted this private antitrust treble damage action on August 20, 1975. It is acknowledged that any such action accrued no later than April 23, 1969,

the date ABC Towing Service of Salinas, Inc. filed its petition in bankruptcy. The cause of action, therefore, appears barred because, as required by 15 U.S.C. § 16(b), it was not commenced "within four years after the cause of action accrued."

To avoid this conclusion plaintiff points to that portion of 15 U.S.C. § 16(a) which suspends the running of the statute of limitations during the pendency of "any civil or criminal proceeding . . . instituted by the United States" and for one year thereafter and contends that the empanelling on February 7, 1972 of the grand jury which subsequently indicted the defendant-appellees, suspended the running of limitations as of that date. This suspension, occurring within four years from the accrual date of the cause of action, should preserve the cause until the expiration of one year following the termination of the criminal proceeding. Inasmuch as these proceedings at the earliest were terminated by the appellees entering pleas of *nolo contendere* and being sentenced on September 27, 1974, a complaint filed on August 20, 1975 should be regarded as well within the permissible one year.

The defendants, however, insist that the empanelling of a grand jury did not suspend the running of limitations. Only an indictment so functions and in this instance the indictment was issued on August 2, 1973, a date more than four years subsequent to the date the cause of action accrued. The cause, therefore, should be barred by limitations the defendants contend.

Accordingly the defendants moved for summary judgment after the above facts were revealed by the complaint and developed through depositions. The motion was granted by the district court. We affirm.

I.

Purposes Served By Tolling Provisions of 15 U.S.C. § 16(b).

Plaintiff rests his case on the purposes Congress intended to serve in enacting those provisions of the Clayton Act which now constitute 15 U.S.C. § 16(a) and (b).[1] Section 16(a) makes final judgments or

[1] 15 U.S.C. § 16(a) and (b):

(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

decrees resulting from civil or criminal proceedings brought by the United States prima facie evidence in any action under federal law brought by a private party against the same defendant. Section 16(b), however, is not limited in scope to being only "a logical backstop for the prima facie evidence clause of 35(a) [15 U.S.C. § 16(a)]" *Minnesota Mining v. N. J. Wood Co.*, 381 U.S. 311, 319 (1965). Its purpose has been described by the Supreme Court in *Minnesota Mining* as follows:

> "As we have pointed out, the textual distinctions as well as the policy basis of § 5(b) indicate that it was to serve a more comprehensive function in the congressional scheme of things. The Government's initial action may aid the private litigant in a number of other ways. The pleadings, transcripts of testimony, exhibits and documents are available to him in most instances. In fact, the rules of the Commission so provide. 16 CFR § 1.132(e). See generally 16 CFR § 1.131 et seq. Moreover, difficult questions of law may be tested and definitively resolved before the private litigant enters the fray. The greater resources and expertise of the Commission and its staff render the private suitor a tremendous benefit aside from any value he may derive from a judgment or decree. Indeed, so useful is this service that government proceedings are recognized as a major source of evidence for private parties."

Minnesota Mining v. N. J. Wood Co., supra, at 319. This purpose expresses a "desire that private parties be permitted the benefits of prior government actions." *Id.* at 320. Such a purpose, plaintiff insists, in this case can be served adequately only by interpreting the statutory language "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws" as embracing the empanelling of a grand jury. Only in that manner can a private party situated as is the plaintiff here get the full benefits of the government's prior actions.

Although the plaintiff is correct in asserting that 15 U.S.C. § 16(b) serves the broad and beneficent purpose of aiding private antitrust litigants, so as to use "private self-interest as a means of enforcement" of antitrust laws, *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 751, it is also true that it is a statute of repose. This feature emerges clearly when one considers the purposes of the Act of July 7, 1955, 69 Stat. 282, which amended 15 U.S.C. § 16(b). Prior to this Act § 16(b) merely suspended the running of the limitations period, the limits of which were fixed by state law. This led to considerable confusion in computing the correct period within which a suit was required to be brought.[2] To eliminate this confusion the Act established a uniform statute of limitations of 4 years and provided the suspension of the statute

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[2] S. Rep. No. 619, 84th Cong., 1st Sess. 2 (1955), *reprinted in* 1955 U. S. Code Cong. & Ad. News 2330, 2331.

> "As previously indicated, the antitrust laws grant to private parties the right to bring a suit for treble damages to avenge injuries suffered through violations thereof. While this is a federally accorded right of action, at the present time private treble-damage cases are governed by State statutes of limitation.
>
> Under this ruling a number of anomalous situations may arise. A plaintiff located in State A who is injured by a conspiracy may find himself barred by the local statute of repose, whereas an injured party in State B, wronged by the very same collusive action, may still have a valid cause of

would extend "during the pendency" of the federal civil or criminal proceeding and "for one year thereafter." Finally, the Act provided that, in the event the new uniform 4-year statute is tolled, "any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued." In this manner the termination date of the limitations period was designed to afford private liti-

action. While this may be unjust insofar as plaintiffs are concerned, defendants fare little better under the rule. Where conspiracies occur on a nationwide level and it is determined that the limitation law of the place of injury governs the case, a plaintiff injured in several jurisdictions is permitted to select as his forum the State with the most favorable statute. In such cases, the defendant remains in constant jeopardy until the longest period of limitations has transpired. Also adding to the confusion is the frequently present problem of a conflict of laws in determining which State statute is controlling, the law of the forum or that of the situs of the injury.

Even when the State whose statute of limitations is applicable has finally been ascertained, there remains still another hurdle to be overcome, namely the selection of the appropriate law of the State that governs private triple-damage proceedings. The problem is complicated in many instances by virtue of the fact that statutes of limitation must frequently be chosen from those pertaining to the ancient common-law forms of action such as trespass to persons and property, damage to property, and actions in the nature of actions on the case. In those instances where the State law has established a special statute of limitations for actions upon a liability created by statute, the selection of the proper limitation period may be immeasurably easier. Even here, however, confusion as to the correct limitation period abounds.

. . . .

It is one of the primary purposes of this bill to put an end to the confusion and discrimination present under existing law where local statutes of limitations are made applicable to rights granted under our Federal laws. This will be accomplished by establishing a uniform statute of limitations applicable to all private treble damage actions as well as Government damage actions, of 4 years."

gants an opportunity to take advantage of the government's efforts and to make its calculation reasonably certain.[3]

We, therefore, in interpreting section 16(b) must be guided not only by a Congressional intent to aid private litigants but also by its intent to make reasonably certain and predictable the determination of the duration within which a private antitrust suit must be brought. Our interpretation is important because, not only will it fix the period within which a suit may be brought, it also will affect, by fixing the duration of the period of suspension, the period of time with respect to which damages may be recoverable.

[3] S. Rep. No. 619, 84th Cong., 1st Sess. 2 (1955), *reprinted in* U. S. Code Cong. & Ad. News 2330, 2332.

"This bill makes several important changes in the tolling provisions of existing law. As presently written, section 5 of the Clayton Act tolls the statute of limitations with respect to private treble-damage suits during the pendency of a suit by the United States to punish or restrain violations of the antitrust laws. This period of tolling is continued by the present bill with several modifications.

There are many instances where the statute of limitations as to a private cause of action may nearly have expired before suit is instituted by the Government under the antitrust laws. Although the statute is tolled during the pendency of the proceedings brought by the United States, the plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government suit if, upon its conclusion, he has but a short time remaining to study the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his complaint. To alleviate such difficulties, the present bill would extend the tolling period not only for the duration of the Government's antitrust suit, but for 1 year thereafter. This would guarantee all plaintiffs an adequate period in which to take advantage of Government antitrust proceedings."

II.

Plaintiff's Interpretation Inconsistent With Section 16(b)'s Statute-of-Repose Purpose

Plaintiff in effect argues that any interpretation which will extend the period within which a private suit can be brought serves to aid private litigants and is thus an interpretation intended by Congress. As indicated above, this ignores the statute-of-repose purpose of section 16(b). To serve that purpose we should eschew an interpretation which could introduce at another critical point in the calculation of the total period within which a suit may be brought a degree of uncertainty even greater than that which Congress eliminated in 1955. Plaintiff's expansive reading of Congressional intent undoubtedly would lead to just that. In calculating the expiration point of the time within which a suit may be brought, uncertainty about when suspension of the running of the four-year statute commences would be as troublesome as were the uncertainties to which the 1955 Act was addressed.

Our description of the plaintiff's argument is not a strawman we have devised to conceal the force of his position. It is true that the date of empanelling is a fixed and certain date. The difficulty with its selection is that it bears no logical relationship to an event to which we can attach the statutory language "Whenever any civil or criminal proceeding is instituted to prevent, restrain, or punish violation of any of the trust laws, ..." Proceedings are "instituted" either

before or after empanelling of the grand jury. Mere empanelling "institutes" nothing. It is either commencing the investigation, presenting to the grand jury, or returning the indictment that does that. If empanelling should be deemed meaningful *only* when an indictment ultimately is returned, it is the indictment which is the operative "institution" of proceedings, not the empanelling of the grand jury. To relate the date of the suspension back to the empanelling of the grand jury makes no more sense than relating it back to the date final administrative approval of the prosecution was given or any other earlier date with respect to which there exists proof that the government had determined to investigate possible antitrust violations by the defendant. On the other hand, if the date the grand jury is empanelled is deemed meaningful even if *no* indictment is returned then it is clear that it is merely an arbitrary date selected to signify that at some prior date the government decided to investigate the defendant for antitrust violations.

The short of the matter is that there exists little reason, other than it fits the needs of the plaintiff's case, to accept the date of grand jury empanelling as the date suspension commences. The date of the return of an indictment fits comfortably within the statutory language while empanelling the grand jury does not. The latter is not an act having as its purpose the prevention, restraint, or punishment of violations of the anti-trust laws. The initiation of an investigation or a decision to prosecute more com-

fortably fits the statutory language than does empanelling the grand jury. Were we to select empanelling today, these more appropriate times would be selected tomorrow. To select either, however, would introduce great uncertainty in fixing the time at which the suspension period commences. This would frustrate the statute-of-repose purpose of section 16 (b). We decline to embark on a course that could lead to such an end.

III.

Practical Difficulties In Accepting Plaintiff's Position.

In reaching our conclusion we have also been influenced by a desire to avoid certain practical difficulties relating to grand jury secrecy which the plaintiff's position would involve. See Rule 6(e), Fed. R. Crim. P. (as amended Oct. 1, 1977). Section 16(b) suspends the limitation period "in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding . . . . " To determine whether proceedings before a grand jury involved "any matter complained of" upon which a private right of action is based in whole or in part, grand jury proceedings would be required to be carefully scrutinized. Moreover, considerable judicial time would be consumed in striking the exquisite balance between serving the objects of grand jury secrecy on the one hand and those of section 16(b), as interpreted by the Supreme Court in *Minnesota Mining Co.,* on the other. *Cf.*

U.S. Industries, Inc. v. United States District Court, 345 F.2d 18 (9th Cir. 1965). This task would be especially difficult when no indictment of the antitrust defendant was returned. Plaintiff suggests an *in camera* proceeding (initiated undoubtedly in some instances by no more than uninformed suspicion) in which the trial court would sift the grand jury proceedings for "any matter complained of" on which the plaintiff's suit might be based. To an impractical degree the plaintiff's position imposes upon the trial court a highly complex and difficult task whereas that task is relatively simple so long as we adhere to the date an indictment is returned as the date criminal proceedings which suspend the 4-year limitation period commence. *See State of Michigan v. Morton Salt Company,* 259 F. Supp. 35, 45 (D. Minn. 1966). Adherence to such a date may not eliminate all necessity to strike the exquisite balance in view of the teaching of *Minnesota Mining Inc.* and *Leh v. General Petroleum Corp.,* 382 U.S. 54, 58-59 (1965); but it does confine the task to substantially more manageable proportions than would otherwise be the case.

Concerns rooted in a desire to improve judicial efficiency must occupy a low order of priority when either the commands of Congress or the insistent summons of justice so indicate; however, they occupy a high order when neither so do. This is the situation which this case presents.

AFFIRMED.

Appendix B

United States District Court
Northern District of California

No. C-75-1757 ACW

J. M. Dungan, as Trustee for ABC Towing Service of Salinas, Inc., a bankrupt corporation,

Plaintiff,

vs.

Morgan Drive-Away, Inc., National Trailer Convoy, Inc., and Transit Homes, Inc.,

Defendants.

[Filed June 23, 1976]

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This is an antitrust action brought by the trustee in bankruptcy for ABC Towing Service of Salinas, Inc., against three companies engaged in the mobile home transportation business. Defendants have moved for summary judgment on the ground that plaintiff's claims are barred by the statute of limitations.

The last date upon which plaintiff's cause of action could accrue was April 23, 1969, the date ABC Towing Service of Salinas ceased doing business and filed

its bankruptcy petition. This action was filed on August 20, 1975, well over the four-year period allowed by the statute of limitations, 15 U.S.C. §15b.

The complaint asserts that under the provisions of 15 U.S.C. §16(b), the institution of criminal proceedings against the defendants on August 2, 1973, and the subsequent institution of a government civil antitrust suit against the defendants suspended the operation of the statute of limitations. Since the criminal case began over four years after plaintiff's claims accrued, however, the indictment of the defendants in August, 1973, came too late to allow plaintiff the benefits of 15 U.S.C. §16(b).

Recognizing this dilemma, plaintiff now asserts that the February 7, 1972, empanelling of the grand jury which ultimately returned the August, 1973, indictment tolled the statute of limitations. This position must be rejected.

A grand jury is an investigative body. That a special grand jury[1] may not be convened until after the government's investigation of a particular matter is well advanced does not change the nature of the grand jury's activity, for a special grand jury is not required to be satisfied with the government's initial presentation nor is it required to indict those accused by the government. Even if indictments are

[1]Contrary to the implication in plaintiff's brief, there is no indication in the record that the grand jury that indicted the defendants was a special grand jury within the meaning of 18 U.S.C. §§3331-3334. In any event, the relevant considerations are the same whether or not a regular or special grand jury is involved.

eventually returned, the grand jury itself has no power to "prevent, restrain, or punish" for violations of antitrust or related statutes. Proceedings before grand juries are not the type of proceedings contemplated by 15 U.S.C. §16(d). See *State of Michigan v. Morton Salt Company,* 259 F.Supp. 35, 44 (D.Minn. 1966), *affirmed on other grounds sub nom. Hardy Salt Co. v. State of Illinois,* 377 F.2d 768 (8th Cir. 1967).

This conclusion is reinforced by the secret nature of grand jury deliberations. In order to effectively apply 15 U.S.C. §16(b) as plaintiff contends, this traditional element of secrecy would have to be eliminated in every private antitrust case where there was a previous grand jury proceeding. The statute of limitations would be tolled for private suits based on "any matter complained of" before the grand jury. Where no indictments are returned, the grand jury proceedings would have to be made public in order to determine if anything relating to antitrust matters was presented to the grand jury. Even when indictments were returned, the grand jury proceedings would have to be made public in order to determine whether there were any other matters that a private plaintiff may make the subject of litigation, for it cannot be assumed that indictments cover every area presented for the grand jury's consideration.[2] In addition, if private antitrust litigants are to receive

[2]Similarly, in order to set the appropriate limitations period, the proceedings of the grand jury would have to be examined to determine exactly when the investigation of a particular matter began and, in a case where no indictments are returned, when that investigation ended.

any benefits from the institution of grand jury proceedings other than the mere extension of the statute of limitations, they would have to be given access to the material presented to the grand jury. *Cf. Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.,* 381 U.S. 311, 319 (1965).

These rationales for disclosure would apply in all cases—it would make no difference whether the plaintiff would, as here, be otherwise barred by the statute of limitations or whether there was an otherwise diligent plaintiff who wished to extend a defendant's liability as far back in time or to as many areas of business practice as possible. Plaintiff points out that grand jury secrecy is not absolute and that access to materials presented to the grand jury has been given to private antitrust litigants in the past. Such disclosures, however, normally involve considerations particular to each case. *U.S. Industries, Inc. v. United States District Court,* 345 F.2d 18 (9th Cir. 1965). Plaintiff's position, on the other hand, would require disclosure as a routine matter, but plaintiff has not shown that such a change in traditional considerations of secrecy in grand jury matters was contemplated by the enactment of 15 U.S.C. §16(b).[3]

The complaint also alleges that plaintiff had no knowledge of any antitrust violations until the criminal proceedings were instituted by the government and that defendants had fraudulently concealed their

[3]The limited nature of the reports that may be issued by special grand juries, 18 U.S.C. §3333, does not modify this conclusion.

violations of the antitrust laws.[4] Under this theory, plaintiff must show that defendants concealed the basic facts that would have revealed the existence of antitrust violations *and* that plaintiffs, although exercising due diligence, failed to discover those facts during the limitations period. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 460-461 (2d Cir. 1974); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975).

Through the deposition testimony of the two men most extensively involved with the business affairs of ABC Towing Service of Salinas, defendants have shown that the basic facts underlying the present antitrust claims were known, or should have been known, by these two men before or during the four-year limitation period ending April 23, 1973. Plaintiff has not produced any affidavits or other material that conflicts with defendants' characterization of the deposition testimony. Summary judgment in favor of defendants on this issue is therefore appropriate.

Accordingly, It Is Hereby Ordered that defendants' motion for summary judgment is GRANTED, and that plaintiff's action is DISMISSED.

Dated: June 23, 1976.

Albert C. Wollenberg
United States District Judge

[4]The conclusory allegations of the complaint fail to meet the requirement of Federal Rules of Civil Procedure Rule 9(b) that "the circumstances constituting fraud . . . shall be stated with particularity". *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975). In view of defendants' presentation in support of their motion for summary judgment, however, there is no need to require an amended complaint.

Appendix C

CLAYTON ACT, SECTION 5, AS AMENDED (15 U.S.C. § 16)

§ 16. Judgments—Prima facie evidence

(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

* * *

Suspension of limitations

(i) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running

of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

As amended Dec. 21, 1974, Pub.L. 93-528, § 2, 88 Stat. 1706; Sept. 30, 1976, Pub.L. 94-435, Title III, § 302 (2), 90 Stat. 1396.